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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 664

J. V. DUNN,

Appellant,

versus

STATE OF LOUISIANA,

Appellee.

APPEAL FROM THE SUPREME COURT OF LOUISIANA

MOTION TO DISMISS THE APPEAL OR AFFIRM

JACK P. F. GREMILLION
Attorney General
State of Louisiana

WILLIAM P. SCHULER
Second Assistant Attorney General

RAGAN D. MADDEN
District Attorney
Third Judicial District,
State of Louisiana

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States and in compliance with the request of court moves to affirm the judgment of the Louisiana Supreme Court, or in the alternative to dismiss the same on the grounds that the question is so unsubstantial as not to warrant further argument.

STATEMENT

This is an appeal from a judgment of the Louisiana Supreme Court affirming the conviction of appellant for the crime of theft, the value of which exceeded the

sum of $100.00 (La. R.S. 14:67). Upon conviction of this crime the defendant is subject to imprisonment of not more than ten years with or without hard labor.

The basic contention of appellant is twofold: First, that he was convicted of a serious offense; and, secondly, that he should have been accorded a twelve man jury which should have had to return a unanimous verdict. Under the laws of Louisiana for an offense punishable with or without hard labor, a defendant is entitled to a five man jury which must return a unanimous verdict (C.Cr.P. 782).

Since the State of Louisiana conceeds that the crime of which defendant was convicted is a serious offense, and, further, since the jury verdict was unanimous the sole question presented would appear to be: Is a twelve man jury a necessity in a case of this type?

ARGUMENT

The sole basis for appellant's argument in this case is the hope that *Duncan v. La.*, 391 U.S. 145, has grafted the Sixth Amendment jury right trial onto state criminal proceedings via the due process clause of the Fourteenth Amendment. A careful analysis of the *Duncan* case negatives this assumption. The plurality opinion holds that where the possible penalty may be two years imprisonment, a jury trial is a necessity in order to afford due process of law. No where in the opinion did the court state that the jury must consist of twelve men, must be unanimous, or that the court must be permitted to comment on the facts.

This is apparent from the language of the decision itself:

> 391 U.S. at p. 149
> "Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee."
>
> 391 U.S. at p. 154
> "We are aware of prior cases in this Court in which the prevailing opinion contains statements contrary to our holding today that the right of jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction. Louisiana relies . . ."
>
> 391 U.S. at p. 159
> "It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States."

The concurring opinions add little to the interpretation of the plurality opinion since one merely beats

the drums for the total absorption doctrine while the other adopts the principle that the state should be permitted, within constitutional limits, to experiment in the field of law enforcement.

It would, indeed, be somewhat humorous, if such serious issues were not presented, to contend that the magical number twelve is synonymous with fairness.

Indeed, what is so fundamental to fairness about a twelve man unanimous jury?[1] It has been stated by legal commentators and historians that the number 12 was chosen in analogy to the twelve prophets and twelve disciples; or possibly the twelve stones referred to in Bible history; and the institution of twelve judges selected in ancient days to try matters of law are stated to be a possible precedent. Additionally there might be mentioned the Roman Code of the twelve tables and the fact that among Scandinavian nations twelve was a favorite number for constituting a court. Some legal scholars believe that the number twelve was adopted among the Anglo-Saxon and Normans from the twelve witnesses whom they believe sufficient to establish the credibility of a party to a transaction. It has even been suggested that the "twelve men good and true" represent the twelve Apostles and are divinely endowed with a unique fact finding ability. See

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[1]Osborn, a document specialist after more than twenty five years observing jury trials throughout the United States, observed in *The Mind of the Juror* (Boyd Printing Company 1938) that jury fixers know that whenever the requirements of a unanimous twelve man verdict exists, it is necessary to reach only one juror in order to defeat justice.

Robert Moschzisker Trial by Jury (1922), pages 290-291; Silving Essays on Criminal Procedure, (Dennis and Co. 1964) page 53.

Jeremy Bentham said "Antiquity of the law is not reason. The antiquity of a law may create a prejudice in its favour, but it is not a reason of itself ..." "Arbitrary definition is not reason. Nothing is more common among jurists and political writers than to build up theories, and even to construct huge works upon definitions that are purely arbitrary". Dumont's Bentham, *Principles of Legislation,* translated by John Neal (1830), pages 286, 287.

Neither antiquity nor arbitrary definition constitute any reason for holding that the unanimous agreement of an arbitrary number of twelve men, possibly based on superstition, is the only method of producing a fair finding of fact.

The absurdity that results from relying on ancient forms of common law trial by jury is illustrated in a recent state criminal proceeding in Baton Rouge, Louisiana, reported in the Baton Rouge Morning Advocate of November 17, 1967. In that case the accused argued that if the word "peers" is defined as "persons of the same rank or standing" a nineteen year old defendant should be tried before a jury composed only of nineteen year olds.

This court has not hesitated to reject the English common law in certain instances when it did not measure up as a standard by which to determine the rights

of Americans. See *Powell v. Alabama*, 287 U. S. 45, 65 (1932); (Common law right of counsel in misdemeanors but not felonies rejected); *Grosjean v. American Press Co.*, 297 U. S. 233, 249 (1936) (Common law licensing of the Press rejected); *Mallory v. Hogan*, 378 U.S. 1 (1964) (Common law rule that the admissibility of evidence is not affected by the illegality of the means through which the evidence was obtained was rejected); See Deutsch, *Civil Law Influences on the Development of Civil Liberties*, 12 Tulane Law Review, 331 (1938); Orfield's *Searches and Seizures in Federal Criminal Cases*, 24 La. Law Review, 665, 666 (1964); *The Challenge of Crime in a Free Society;* a report by the President's Commission on Law Enforcement and Administration of Justice, page 306, note 18.

CONCLUSION

For the reasons previously assigned it is urged that the appeal in this case should be dismissed or, in the alternative, the judgment of the Louisiana Supreme Court affirmed.

Respectfully submitted,

JACK P. F. GREMILLION
Attorney General
State of Louisiana

WILLIAM P. SCHULER
Second Assistant Attorney General

RAGAN D. MADDEN
District Attorney
Third Judicial District,
State of Louisiana

CERTIFICATE

I, William P. Schuler, a member of the Bar of the United States Supreme Court, hereby certify that a copy of the above and foregoing brief has been served on counsel for appellant:

PAUL HENRY KIDD
310 South Grand Street
Monroe, Louisiana 71201

GLADYS KESSLER
1910 N. Street, N.W.
Washington, D.C. 20036

by placing same in the United States Mail, properly addressed, with sufficient postage thereto affixed.

New Orleans, Louisiana, this ____ day of January, 1970.

WILLIAM P. SCHULER